

New York State Department of Environmental Conservation

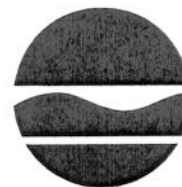
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Alexander B. Grannis
Commissioner

November 2, 2007

Office of Electricity Delivery and Energy Reliability, OE-20

U.S. Department of Energy

1000 Independence Avenue, SW.

Washington, DC 20585

Attn: Docket No. 2007-OE-01

Mid-Atlantic Area National Interest Electric Transmission Corridor

To Whom It May Concern:

For filing, please find the petition of the New York State Department of Environmental Conservation for rehearing in the above titled proceeding. Should you have any questions, please feel free to contact me at (518) 402-8537.

Sincerely,

J. Jared Snyder

Assistant Commissioner for

Air Resources, Climate Change & Energy

cc: Commissioner Carol Ash, NYS Office of Parks and Historic Preservation
Commissioner Patrick Hooker, NYS Department of Agriculture
Attorney General Andrew M. Cuomo

**UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY**

Mid-Atlantic Area
National Interest Electric Transmission Corridor

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Docket No. 2007-OE-01

**PETITION FOR REHEARING
OF THE STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

Pursuant to Section 313 of the Federal Power Act, 42 USC § 8251, the State of New York Department of Environmental Conservation (NYSDEC) hereby submits its Petition for Rehearing of the Department of Energy's (Department or DOE) October 5, 2007 Order in the above captioned proceeding.

On October 5, 2007, the DOE issued a final report in connection with its August 2006 National Electric Transmission Congestion Study (NIETC) under section 216 of the Federal Power Act (FPA) and Order designating two national interest electric transmission corridors of which the Mid-Atlantic National Interest Electric Transmission Corridor (Mid-Atlantic Corridor) is the subject of this Petition. The Mid-Atlantic Corridor includes 47 counties in New York State, the entirety of New Jersey, Delaware, and the District of Columbia, and significant portions of Maryland, Pennsylvania, Ohio, Virginia and West Virginia. A National Corridor designation is significant because it allows for the assertion of federal jurisdiction to issue permits for the construction and operation of electricity transmission facilities located within. *See* 42 USC § 824p(b).

STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

NYSDEC's primary argument is that DOE has not complied with the National Environmental Policy Act (NEPA), 42 USC §§ 4321-4327, the Council on Environmental Quality's implementing regulations, 40 CFR Part 1500 et. seq., and DOE's implementing regulations, 10 CFR Part 1021 et seq. In accordance with Section 313 of the FPA, 42 USC § 8251, NYSDEC provides the following statement of issues and specification of errors and requests that the Department grant a rehearing on the Order based on the following errors of law:

- (1) DOE should have prepared an environmental assessment in accordance with NEPA and its own implementing regulations. *See* 10 CFR 1021.321, 40 CFR 1508.9.
- (2) DOE erred in its determination that the designation of the Mid-Atlantic National Corridor was not a major federal action significantly affecting the quality of the human environment, and further erred by not conducting a proper review of this action. *See* 42 USC § 4332.
- (3) DOE erred by designating the Mid-Atlantic National Corridor without first consulting with the Secretary of the Interior and the Hudson River Greenway Council, a State agency, and the Greenway Conservancy for the Hudson River Valley, a public benefit corporation, as required by Section 908 of the Hudson River Valley National Heritage Area Act of 1996, Pub L 104-333, Div.II, Title IX, Nov.12,1996,110 Stat.4275; Pub.L.105-83,Title III, §§ 317,324, Nov.14,1997,111Stat.1595,1597; Pub. L. 106-176,Title II, § 206, Mar.10, 2000 (Sec. 903) (hereinafter Heritage Area Act).

- (4) DOE failed to consult with the Department of the Interior and other federal entities as required under the Endangered Species Act. *See* 16 USC §§ 1531-1544, 1536.
- (5) The DOE erred by ignoring the highly controversial nature of its designation and not undertaking an environmental review pursuant to NEPA. *See* 40 CFR 1508.27.
- (6) DOE's Order improperly supplants, supercedes and interferes with the relationship between the State of New York and its regulatory and environmental review process.

THE INTERESTS OF NEW YORK STATE IN THIS PROCEEDING

The Mid-Atlantic Corridor is sweeping in its scope, covering a significant area of New York State, all of New Jersey, Delaware and the District of Columbia, and significant portions Maryland, Ohio, Pennsylvania, Virginia and West Virginia. Forty-seven counties in New York State are encompassed within the National Corridor, including counties that have been designated pursuant to the State Constitution as Forest Preserve counties, New York City and Long Island, and large portions of central and northern New York State, including the Catskill and Adirondack Parks in New York's constitutionally protected Forest Preserve. *See* NY Constitution, Article XIV. The New York portion of the Corridor contains an abundance of environmental and natural resources, including wild and scenic rivers, wetlands, a number of

threatened and endangered species, streams, wildlife conservation areas, historic areas, state parks and forest lands, to name a few. All of these resources are protected under State law.

NYSDEC has included a series of maps with this Petition to illustrate the breadth and scope of some of the significant State resources which are potentially imperiled by the designation. See Attachment A (Protected Open Space within portions of the NIETC Designation), Attachment B (Protected Cultural, Natural and Agricultural Resources within portions of the NIETC Designation), Attachment C (State Recreational Areas portions of the NIETC Designation), Attachment D (Protected Water Resources portions of the NIETC Designation), Attachment E (Protected Resources along proposed NYRI route).

NYSDEC is the agency within New York State responsible for conserving, improving and protecting New York's natural resources and environment, and preventing, abating and controlling water, land, and air pollution to enhance the health, safety and welfare of the people of the State and their overall economic and social well-being. NYSDEC is charged with implementation of the State's environmental policy which, among other things, is to: protect New York's environment and aesthetic sources; guarantee the widest range of beneficial uses of the environment in a manner protective of the environment and human health; promote development and technology that minimize adverse impacts; preserve the unique qualities of special constitutionally protected resources such as the Adirondack and Catskill Forest Preserves, and care for shared resources such as air and water.

ARGUMENTS

I. AT A MINIMUM, DOE SHOULD HAVE PREPARED AN ENVIRONMENTAL ASSESSMENT IN ACCORDANCE WITH NEPA AND ITS OWN IMPLEMENTING REGULATIONS

At a minimum, DOE should have taken the preliminary step of preparing an Environmental Assessment (“EA”) to document its decision that the National Corridor designation will not result in an impact significant enough to warrant preparation of an EIS. *See* 40 C.F.R. § 1508.9.¹ It erred by not doing so.

Under NEPA regulations implemented by the Council on Environmental Quality (CEQ), an EA is required when a project does not fall within a categorical exclusion. *See* 40 C.F.R. 1501.3(b), 40 C.F.R. 1508.9. DOE’s regulations specify that an EA is required for projects which are listed in Appendix C (not applicable here), or which are not listed as a general agency action categorically excluded from NEPA in Appendices A, B, or D to 10 CFR Part 1021 Subpart D. The designation of National Corridors pursuant to the EPAct is not one of the actions categorically excluded from NEPA. 42 USC §4331 et seq. DOE’s regulations further state that “DOE shall complete its NEPA review before rendering any final adjudicatory decision.” 1- CFR 1021.214. As DOE acknowledges in its response to public comments, the designation was made in the context of an administrative adjudicatory proceeding. Clearly, DOE was therefore obligated to prepare an EA instead of rendering an adjudicatory decision in contravention of NEPA and its implementing regulations.

¹ An EA is a “concise public document that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.1998) (citing 40 C.F.R. 1508.9).

NEPA requires that an agency that determines not to prepare an EIS must instead issue a “finding of no significant impact,” or “FONSI,” to justify its determination that the project would not have a significant effect on any aspect of the environment. *See* 40 C.F.R. 1508.13. If DOE had determined that the National Corridor designation would have had no impact, it should have prepared a FONSI describing the basis for its conclusion. It is NYSDEC’s position that a proper Environmental Assessment for the NIETC designations at issue here will reveal, with certainty, the necessity to prepare a full-scale EIS.

II. THE FACTS CLEARLY ESTABLISH THAT THE MID-ATLANTIC CORRIDOR DESIGNATION SHOULD HAVE BEEN REVIEWED AS A MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT

A. The Designation of a National Corridor is a Major Federal Action.

NEPA requires a federal agency contemplating a major federal action significantly affecting the quality of the human environment to prepare, prior to undertaking the action, an Environmental Impact Statement (EIS) in which it considers the environmental impact of the action and alternatives to the proposed action. 42 USC § 4332(2) (c). DOE’s designation of a Mid-Atlantic National Corridor pursuant to 42 USC § 824p triggers NEPA’s EIS requirement because it constitutes a major federal action significantly affecting the quality of the human environment within the meaning of NEPA. Contrary to law, DOE determined that National Corridor designations do not trigger NEPA review because they have no environmental impact. NYSDEC believes this determination is wrong as matter of law and fact, and that the designation of a National Corridor constitutes a major federal action significantly affecting the

quality of the human environment.² DOE must step back and comply with NEPA before taking final action designating a National Corridor.

As a threshold matter, DOE dismisses public comments that the National Corridor designations constitute a major federal action requiring the preparation of EIS. Viewing its action in narrow terms, DOE claims its National Corridor designations are not part of an agency action to implement a Federal scheme or program of siting transmission projects. The designations of the Mid-Atlantic and Southwest Area National Corridor, according to DOE, were made for reasons totally unrelated to each other and thus are not part of a federal plan.

Further, DOE states “national corridor designations have no environmental impact. They are only designations of geographic areas in which DOE has identified electrical congestion or constraint problems” (72 Fed Reg 56992). DOE’s artificially constrained analysis is fundamentally wrong and inconsistent with the policy objectives of NEPA. Moreover, as set forth later in this petition, the effect of DOE’s conclusion is to eviscerate State environmental laws and state transmission line siting proceedings.

NEPA requires a federal agency to prepare a detailed EIS for “all major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(c). “Major federal actions” have been defined to include, among other things, “new or revised agency rules, regulations, plans, policies or procedures, and legislative proposals.” 40 C.F.R. 1508.18(a); *see also* Daniel R. Mandelker, NEPA Law and Litigation, § 8 (2007 Suppl.) (“major federal actions” to encompass a wide range of actions). In particular, federal actions encompass the adoption of plans upon which future agency actions will be based. *See* 40 CFR 1508.18(b). DOE’s

² The New York State Public Service Commission will address the sufficiency of the data and record supporting DOE’s determination in its Motion for Rehearing.

implementing regulations similarly defines the term “actions” to include a project, program, plan or policy as discussed in 40 CFR 1508. 10 CFR § 1021.104(b). The essential question, thus, is not whether the Southwest and Mid-Atlantic National Corridors are related to each other, as DOE suggests. Rather, the more pertinent inquiry is whether the Mid-Atlantic National Corridor designation is part of a federal plan. NYSDEC believes that the designation of the Mid-Atlantic National Corridor that encompasses 8 States and the District of Columbia is a federal plan and thus is a “major federal action” within the meaning of NEPA and its implementing regulations. *See* 42 USC § 4332(2) and 40 CFR 1508.8, 1508.18 and 1508.27.

The designation of a National Corridor is plainly part of a federal plan and thus is a critical step of a federal program expressly set forth in the Energy Policy Act of 2005 (“EPAAct”), the objective of which is to set forth a framework for addressing the issue of electric transmission congestion in the United States. *See* 42 USC § 824p. EPAAct embodies federal energy policy to update the nation’s transmission infrastructure and sets out procedures for DOE to follow to accomplish these objectives. The essential components of this federal energy plan include: (1) the preparation of a congestion study by DOE identifying areas experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers; (2) the preparation of a report by DOE based on the congestion study, which may designate any geographic area experiencing electric transmission capacity constraints or congestion that adversely effects consumers as a national interest electric transmission corridor; and (3) the issuance by the Federal Energy Regulatory Commission (FERC) of federal construction permits for transmission facilities proposed in a national corridor designated by DOE pursuant to its authority under EPAAct.

The designation of a National Corridor is a significant component of a federal plan because it provides the mechanism to expedite siting of electric transmission facilities within its boundaries. Under EPOA, FERC may preempt a State permitting agency and assert jurisdiction to issue construction permits for transmission facilities if it finds, among other things, that the State has withheld approval for more than a year after the filing of an application or that the State has conditioned approval in such a manner that the project sponsor determines is too burdensome. *See* 42 USC § 824(b). Thus, a State is forced to expedite its permitting process or face the prospect of FERC issuing a permit. In addition, the EPOA removes another hurdle to transmission line siting in National Corridor areas by allowing applicants to acquire the right-of-way over private property by exercise of the power of eminent domain in the appropriate U.S. District Court. Thus, the National Corridor designation is the key to a federal plan that “guides [or prescribes] alternative uses of federal resources” and “upon which future agency actions will be based.” It is an important step of a “group of concerted actions to implement a specific policy or plan” or “systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.” 40 CFR 1508.18(b).³

³ Both DOE and the Federal Energy Regulatory Commission (FERC) have primary responsibility for implementing the EPOA program for siting interstate transmission facilities. In June 2006, FERC issued a Notice of Proposed Rulemaking in accordance with Section 1221 of the Energy Policy Act of 2005 (“EPOA”) to implement permitting procedures and requirements under NEPA for project sponsors seeking approval to construct and operate electric transmission facilities within a NIETC to be designated by DOE. *See* 71 Fed. Reg. 36,259 (June 26, 2006). Two months later, DOE published a notice in the Federal Register requesting comments “on the National Electric Transmission Congestion Study, on future steps for identifying and addressing electric transmission congestion, and on possible designation of National Corridors in Critical Congestion Areas.” *See* 71 Fed. Reg. 45407 (August 8, 2006). On May 7, 2007, DOE published a Federal Register Notice seeking comment on two Draft National Interest Electric Transmission Corridor Designations. *See* 72 Fed. Reg. 25,838 (May 7, 2007).

B. The National Corridor designation has the clear potential to significantly affect the quality of the human environment.

1. NEPA applies to all actions that affect the quality of the human environment.

DOE's determination that an EIS is not required rests on its conclusion that the designation of a National Corridor will have no significant environmental impacts. This conclusion is inconsistent with NEPA and its broad legislative and policy objectives. NEPA encompasses all aspects of the environment and environmental values and compels the federal government and its agencies to adhere to those values in carrying out their missions. In furtherance of this broad objective, NEPA sets forth two basic requirements: (1) preventing environmental damage and (2) ensuring that agency decision-makers use all practical means to improve and coordinate federal actions with environmental principles. *See* 42 USC § 4331 (providing in part that the goals of NEPA are to ensure that the federal government is a trustee of the environment for future generations; ensure safe, healthy, productive and aesthetically and culturally pleasing surroundings for all Americans; attain the widest range of beneficial uses of the environment without degradation, risk to health and safety or other undesirable and unintended consequences; preserve important historic, cultural and natural aspects of our national heritage, and maintain an environment which supports diversity and variety of individual choice). Designation of a National Corridor without due consideration as to how it will impact the environment and other critical resources cannot be reconciled with NEPA's principles.

CEQ regulations shed further light on DOE's misstep here. First, the regulations define the term "significantly" in terms of both "context" and "intensity." 10 CFR 1508.27. Significance in context refers to the affected region, the affected interests, and the locality. DOE's action here affects nearly two-thirds of New York State as well as eight other states and the District of Columbia. The intensity of an action refers to its severity, which includes consideration of, among other things: (1) the unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farm lands, wetlands, wild and scenic rivers or ecologically critical areas; (2) the degree to which the effects on the quality of the human environment are likely to be highly controversial; (3) the degree to which the action may establish a precedent for future actions that may have significant effects or represents a decision in principle about a future consideration; and (4) the degree to which the action may adversely affect an endangered or threatened species. *See* 40 CFR 1508.27. An impact or effect on the quality of the human environment may be direct or indirect. 40 CFR 1508.8. Indirect effects are those that may be farther removed from the action but nonetheless reasonably foreseeable, and may include growth inducing effects, changes in land use, population density or growth rate and related effects on air, water and other natural systems, including ecosystems. As used in the NEPA regulations, the term "effects" is synonymous with impacts and includes ecological, aesthetic, historic, cultural, economic, social or health impacts, whether direct or indirect or cumulative. *Id.* As discussed below, the designation of the Mid-Atlantic National Corridor clearly implicates issues of significance.

2. There are many potential significant environmental impacts in New York's portion of the Mid-Atlantic National Corridor.

Unconstrained by New York State law and regulatory requirements, the implementation of the Mid-Atlantic National Corridor designation will have significant environmental impacts. Transmission lines require significant amounts of land and the clearing and potential blasting of hundreds (even thousands) of acres of vegetation and fragile habitat for construction and access roads. The direct and indirect consequences of such land development and subsequent construction and operation of transmission lines are exemplified by the preliminary application filed by New York Regional Interconnect, Inc. ("NYRI") for a Certificate of Environmental Compatibility and Public Need pursuant to Article VII of New York's Public Service Law to construct a 200 mile high voltage transmission line between the Town of Marcy in Oneida County to the Town of New Windsor in Orange County, a project located entirely within the Mid-Atlantic National Corridor. Among other things, concerns have been raised regarding the impacts of the proposed NYRI project on aesthetic and natural resources, community development and character, fish and wildlife (threatened and endangered species), State protected forest lands and wildlife management areas, water resources, public health and safety, wild and scenic rivers, land use patterns, and historical and recreational resources. Concerns have also been raised by members of the public whose property could be impacted by the construction and operation of the project or who may be forced to relinquish significant property rights in eminent domain proceedings. DOE's designation of the Mid-Atlantic National Corridor may jeopardize the protection provided New York's resources under State law.

Below are some of the areas of potential impact that may be implicated by DOE's Corridor designation.

(a) Air Quality Impacts

DOE's own justification for its proposal reveals the potentially adverse impacts the National Corridor designation could have on air quality, within and outside of New York. DOE states that the National Corridor designation is intended to facilitate the transmission of lower-cost energy into congested areas and to increase the diversity of fuel, including coal, used in the production of electricity. Both of these purposes would be served by using the National Corridor designation to facilitate the transmission of electricity generated from coal-fired plants, located primarily outside New York. In general, those plants have higher emissions than New York sources, and are subject to less regulation. For example, New York coal-fired sources are subject to the State's emission limits on mercury emissions, which are more stringent than the federal mercury rule adopted by many upwind States. Similarly, under the Regional Greenhouse Gas Initiative ("RGGI"), New York facilities will be subject to limits on carbon dioxide emissions, unlike facilities located outside the RGGI region. The potential significant impacts to air quality resulting from increased utilization of these upwind sources should be extensively and rigorously evaluated in a comprehensive EIS.

DOE's attempt to downplay environmental concerns as speculative ignores the ramifications of the National Corridor designation. DOE's claim that its National Corridor designations do not endorse transmission options or foreclose non-transmission options fails to recognize that Section 1221 of the EPCA has a single minded objective, which is to address the problem of grid congestion by expanding transmission capacity in areas within a National

Corridor designation. As the New York State Public Service Commission (NYSPSC) has explained, a National Corridor designation favors transmission solutions to the problem of grid congestion and will lead to preemptive siting of long-haul transmission projects that move power from remote generating sources to load centers. *See* 72 Fed Reg 25845. Consistent with the EAct's statutory scheme, the National Corridor designation can therefore be expected to result in the construction of transmission facilities to transport power generated by dirtier, upwind sources.

Furthermore, a designation would likely have a negative impact on the capital investment in alternative solutions, creating roadblocks to the implementation of non-transmission energy solutions. According to NYSPSC, the very act of designation could cause downstream project developers to abandon planned facilities. 72 Fed Reg 25845. Likewise, it could impact the viability of energy conservation measures, undertaken pursuant to Governor Spitzer's goal of reducing energy consumption 15% by 2015. Compliance with NEPA is necessary before any final determinations are made to ensure that all environmental impacts are fully evaluated and that due consideration is given to viable alternatives to the proposed National Corridor designation that may have fewer significant impacts.

(b) State Forest Preserve and the New York State Constitution

The Mid Atlantic National Corridor encompasses much of the 6 million acre Adirondack Park and the 600,000 acre Catskill Park, which each include a mixture of State, municipal and private lands. Virtually all State lands in these two parks--totaling more than 3 million acres--are classified as Forest Preserve. Forest Preserve lands are protected by Article XIV, Section 1 of the New York State Constitution, providing that Forest Preserve lands "shall be forever kept as

wild forest lands" and prohibiting the removal or destruction of timber situated thereon. The Constitutional provision also prohibits the State from alienating any proprietary interest in such lands, such as the conveyance of the fee or the conveyance or taking of a right of way or easement by a utility company.

The Corridor also encompasses State Reforestation Areas and Wildlife Management Areas. State Reforestation Areas and Wildlife Management Areas which are located outside the boundaries of the Adirondack Park and Catskill Park but inside "Forest Preserve counties," defined in ECL Article 9, also are protected by the prohibitions on alienation in Article XIV, Section 1 of the New York State Constitution, as described above.

The use for utility line purposes of State lands protected by the Constitutional provisions described above would require a constitutional amendment before they could be so used. Such amendments require approval by two successively elected legislatures and a subsequent vote by the People of the State.

With respect to State Reforestation Areas and Wildlife Management Areas which are located outside of Forest Preserve counties, there are no constitutional provisions prohibiting their alienation. However, the Department has no statutory authority to convey either the fee or easements or rights of way in the land to any entity. Any such conveyances by the Department would first require an act of the legislature.

Therefore, state constitutional and statutory law prohibit the use of these protected lands for siting transmission lines. However, these lands are included within the scope of the corridor designation. The DOE should evaluate the impacts of the corridor designation on these protected lands in its environmental review.

(c) Federally designated Wild and Scenic Rivers

The designation impacts two sections of the Delaware River that have been designated as Wild and Scenic Rivers under 16 USC § 1274 *et seq*, the Wild and Scenic Rivers Act, that are managed by the National Park Service in cooperation with the State of New York. The management plans drafted by the National Park Service precludes the construction and use of transmission lines in these areas. *See* Conference of Upper Delaware Townships, Final River Management Plan, Upper Delaware Scenic and Recreational River, November 1986, at 134. The DOE has not evaluated the impact of the Corridor designation on these areas.

(d) State Agricultural Resources

In 2006, agricultural production contributed over \$3.4 billion to the New York State economy. Approximately 25 percent of the State's land area is in farms, and more than 8.5 million acres are in agricultural districts, special areas where the state's 35,000 farms can be taxed at lower property tax rates. Most of this land is encompassed by the corridor designation.

(e) National Heritage Areas

The DOE has not evaluated the potential significant adverse impacts of the corridor designation on at least three National Heritage Areas. One of these is the Hudson Valley National Heritage Area, as discussed in Part IV below. In addition the designation encompasses the Erie Canal and Champlain Valley Heritage Areas. DOE erred by not considering the impact of its designation on these areas.

"The Erie Canalway National Heritage Corridor commemorates and celebrates the impacts of the Erie Canal on the creation of the American nation. The 524-mile canal system, over 180 years old, is an engineering marvel that knitted together New England, New York, and

the west, spreading commerce and ideas. Canalway collaborates with its 234 communities to protect this treasured cultural and historic resource and to promote the Erie Canal system as a recreation destination for today's visitors." Pub. L 106-544, §1(a)(4) Div.B, Title VIII, §§ 801 to 810, Dec. 21, 2000; 114 Stat. 2763A-295 to 2763A-303. The Erie Canalway was designated in 2000. At the time, Congress said that "there is a national interest in the preservation and interpretation of the Erie Canalway's important historical, natural, cultural and scenic resources.

The Champlain Valley National Heritage Partnership was designated in 2005 to "recognize the importance of the historical, cultural and recreational resources of the Champlain Valley," and assist the states and local governments "in preserving, protecting and interpreting those resources for the benefit of the people of the United States. The area of the Partnership includes Lake Champlain, Lake George, the Champlain Canal and portions of the Upper Hudson River extending south the Saratoga. Pub. L 109-338, Title II, §§ 281 to 289, Oct. 12, 2006, 120 Stat. 1824.

(f) Endangered Species

There are a myriad of endangered and threatened species within the corridor. These species are protected by the Federal Endangered Species Act (discussed in part III, below) and by New York State's endangered species statute, Article 11 of the ECL, and implementing regulations at 6 NYCRR Part 182. The endangered list includes species listed by New York State and includes the federal list as well. (*See* Attachment F, affidavit of Peter E. Nye with list of species). ECL §11-0535(2) prohibits the "taking" of endangered or threatened species except under license or permit by the DEC (6 NYCRR § 182.5). Whenever any provision of New York's Fish and Wildlife Law authorizes a "taking," the taking must be done by lawful means

and in a lawful manner and pursuant to a NYSDEC issued permit. (ECL§11-0535 (2)).

The leading “taking” case involving threatened and endangered species in New York is *New York State v. Sour Mountain Realty, Inc.*, 703 N.Y.S. 2d 854 (Sup. Ct. Dutchess Co.), *aff’d* 714 N.Y. S. 2d 78 (A.D. 2 Dept. 2000), which dealt with eastern timber rattlesnakes and reaffirmed the State’s interest in protecting endangered and threatened species and the State’s regulatory role in doing so on private lands. Timber rattlesnakes are found throughout the Mid-Atlantic National Corridor.

The ECL provides heightened protection for bald eagles. ECL § 11-0537 states that it shall be unlawful to knowingly or with wanton disregard for the consequences of this act to take climate, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles without a permit from a lawful authority. Bald eagles are found throughout New York State. DOE has not considered the impact of its designation on any of the endangered species protected by federal and state law.

3. The Example of the NYRI Application.

The environmental impacts of the corridor designation are not “hypothetical” in New York. The preliminary NYRI application to the NY PSC demonstrates just how much of an environmental impact the DOE designation of the Mid-Atlantic National Corridor could have on New York alone. In just the presumptive NYRI corridor (NYRI has yet to finalize its application or specifically delineate its proposed route), the transmission lines to be built – some with towers

as high as 135 feet – will pass through or near a wide variety of protected natural and built features, including:

1. 8,905.1 acres of federal and state-regulated wetlands;
2. 66 properties listed or eligible for listing on the National Register of Historic Places;
3. Two National Heritage Areas;
4. Three rivers of national or state significance, including a national Wild and Scenic River, as well as 154 streams classified by DEC as Class C or higher;
5. Three regional recreational trails, including 3,500 feet along the Shawangunk Ridge portion of the Long Path and the Appalachian Trail as it crosses Bear Mountain Bridge, the site of the very first section of the 3,000-mile trail.
6. Three wildlife management areas, two state parks, a state forest and two county parks. See generally, Article VII Application of New York Regional Interconnect, Inc. to the New York State Public Service Commission for a Certificate of Environmental Compatibility and Public Need, Exhibit 4, Environmental Report (May 31, 2006).

III. DOE FAILED TO CONSULT WITH OTHER STATE AND FEDERAL ENTITIES AS REQUIRED UNDER THE FEDERAL ENDANGERED SPECIES ACT

The federal Endangered Species Act (ESA) seeks to protect biological diversity in the U.S. by protecting both the species themselves and the natural systems they depend upon. The Department of Interior's Fish and Wildlife Service implements and regulates under the ESA. *See*

generally 16 USC § 1531-1544.

The ESA requires federal agencies, including the DOE, to insure that “any action authorized, funded or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species....unless such agency has been granted an exemption for such action...In fulfilling the requirements of this section each agency **shall** use the best scientific and commercial data available.” 16 USC § 1536 (a)(2) (emphasis added). There is nothing in the record to indicate that DOE has fulfilled this statutory requirement.

Further, a federal agency “**shall** consult with the Secretary (of Interior) on any prospective action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.” 16 USC § 1536 (a)(3). (emphasis added). There is nothing in the record to indicate that DOE has fulfilled this statutory requirement.

The ESA applies the same affirmative duty to consult if an action could affect any species proposed to be listed or result in the destruction of such a species’ habitat. 16 § 1536(a)(4). There is nothing in the record to indicate that DOE has fulfilled this statutory requirement.

IV. DOE FAILED TO COMPLY WITH THE CONSULTATION REQUIREMENTS OF THE HRVNHA.

As mentioned above, the Mid-Atlantic National Corridor directly impacts three federally designated National Heritage Areas (NHA) in New York State-the Hudson River Valley, the Erie

Canalway and the Champlain Valley National Heritage Partnership. In the case of the Hudson River Valley NHA, federal law imposes mandatory consultation requirements on federal agencies contemplating actions therein. DOE has not complied with these requirements.

According to the National Park Service, a national heritage area is a “place designated by the United States Congress where natural, cultural, historic and recreational resources combine to form a cohesive, nationally-distinctive landscape arising from patterns of human activity shaped by geography. These areas tell nationally important stories about our nation and are representative of the national experience through both the physical features that remain and the traditions that have evolved within them.” (See National Park Service, “*What Is a National Heritage Area*”, <http://www.nps.gov/history/heritageareas/FAQ/INDEX.HTM>) (Accessed October 28, 2007).

Currently, there are 37 NHAs in the country. *Id.* Each area must prepare a Management Plan that must be approved by the Secretary of Interior. The Hudson River Valley National Heritage Area was designated by Congress in 1996 to “recognize the importance of the history and the resources of the Hudson Valley to the Nation,” and to “assist the State of New York and the communities of the Hudson River Valley in preserving, protecting and interpreting these resources for the benefit of the Nation.” (Heritage Area Act at § 903). Significantly, the HRVNHA includes 250 communities in ten counties bordering the Hudson River for 154 miles of tidal estuary. This area is approximately three million acres of Hudson Highlands, Catskill Mountains, rolling farmland and compact villages, small cities and hamlets. The region extends from the confluence of the Mohawk and Hudson Rivers, south to the northern border of New York City. The Heritage Area is managed by the Hudson River Valley Greenway Council, a

state agency, and the Greenway Conservancy for the Hudson River Valley, a state public benefit corporation.

This variety of resources led the National Park Service to describe the Hudson Valley as the "landscape that defined America." Hudson River Valley Greenway, Hudson River Valley National Heritage Area Management Plan at 16 (2002). Congress determined that the Hudson River Valley NHA was of such importance that it directed that "any federal entity conducting or supporting activities directly affecting the Heritage Area, and any unit of government acting pursuant to a federal grant or a federal permit or agreement conducting such activities, **shall to the maximum extent practicable**, consult with the Secretary (of Interior) and management entities with respect to such activities, cooperate with the Secretary and management entities in carrying out their duties under this title and coordinate such activities with the carrying out of such duties, and conduct or support such activities in a manner consistent with the management plan, unless the Federal entity, after consultation with the management entities, determines there is no practicable alternative." (*See* Heritage Area Act at § 908).(emphasis added).

The record developed in connection with this NIETC proceeding contains no evidence that DOE consulted with the Hudson River Valley Greenway Council and the Greenway Conservancy on the designation as it is required to do by law.

V. THE HIGHLY CONTROVERSIAL NATURE OF DOE'S ACTION REQUIRES CONSCIENTIOUS COMPLIANCE WITH NEPA

NEPA requires an agency to evaluate "the degree to which the effects on the quality of the human environment are likely to be highly controversial," and the degree to which the

possible effects on the human environment are highly uncertain or involve unique or unknown risks” 40 CFR 1508.27(b)(4), (b)(5). Courts have defined “controversial” as referring to cases in which there is a substantial dispute about the nature or effect of a major federal action, rather than merely the existence of opposition to a use. *See, e.g., Hanley v. Kleindienst*, 471 F.2d 823, 830-831 (2d Cir. 1972). Courts have held that serious questions over whether an agency should have prepared an EIS may provide a sufficient basis to conclude that an EIS should in fact be prepared. *See, e.g., League of Wilderness Defenders v. Zielinski*, 187 F. Supp.2d 1263 (D. Or. 2002).

The record here establishes that a substantial dichotomy exists about the nature and effect of DOE’s designation of the Mid-Atlantic National Corridor. At one end of the spectrum, DOE contends that National Corridor designations have no environmental impact because they are not siting decisions and do not constitute approval, disapproval, endorsement or rejection of any transmission project or other ground-disturbing activity. *See, e.g., 72 Fed. Reg. 56999, 57012, 57022.* NYSDEC, however, as explained above, believes that the potential environmental impacts of a National Corridor designation are far from premature, speculative or hypothetical at this juncture. A National Corridor designation will have potentially significant environmental impacts because it provides the impetus to construct and operate long-haul transmission line projects - projects that typically implicate a wide array of environmental concerns. A National Corridor designation forces a State to expedite or possibly truncate its permitting process or relinquish its authority to the federal government.

DOE contends that any environmental impacts will be assessed by FERC if and when a transmission line project is proposed, but that review would only focus on one project and not provide a comprehensive and cumulative review of potential environmental impacts throughout the National Corridor. NYSDEC believes that such review will be too late and will ignore the cumulative environmental impacts of potentially multiple transmission line projects being located within a National Corridor.

VI. THE SHIFT IN BALANCE OF POWER IN FAVOR OF THE FEDERAL GOVERNMENT WILL ENCROACH UPON THE STATE'S ABILITY TO IMPLEMENT ITS OWN ENVIRONMENTAL LAWS AND POLICY

Because of the strong potential for usurpation of State authority under the guise of the Federal Energy Policy Act of 2005, the designation of the Mid-Atlantic National Corridor takes on heightened significance due to its potential to erode the ability of a State to enforce its own laws, regulations and policies with respect to environmental protection.

The Mid-Atlantic National Corridor designation fundamentally shifts the relationship between the federal government and New York State. The result of this shift is that the protection of New York's national, cultural and historic resources will operate on a totally different level than before the designation. Prior to the EPAct, and in the absence of a federal National Corridor designation, transmission line siting was and remains a matter almost entirely within the purview of the States, who could evaluate and review transmission projects in accordance with State law and companion FERC regulations, and policy objectives unfettered by federal constraints. With the National Corridor designation, the State review process is jeopardized in two respects. First, EPAct effectively places time limitations on and erodes State

administrative review in National Corridor areas: States must complete their review within a year or cede their role to FERC. In New York, there are virtually no transmission line projects on the order of magnitude contemplated by NYRI, and which are foreseeable given the Mid-Atlantic designation, that have been reviewed and approved within a year. Second, as a result of the National Corridor designation, the federal government is positioned to override State authority in the interest of furthering a federal policy of siting transmission lines.

NEPA review at this preliminary stage provides the only chance for States and the federal government to conduct comprehensive review of the cumulative impacts of the NIETC designation. Additionally, NEPA review would provide the only forum to address larger, region-wide alternative policy issues, such as the upgrading of existing transmission lines. A single application simply cannot lead to a meaningful evaluation of those kinds of issues.

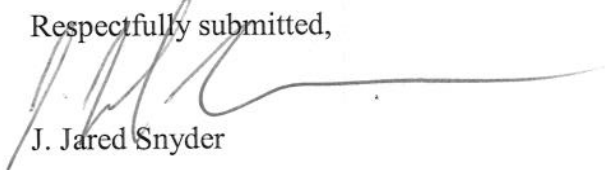
CONCLUSION

Consistent with NEPA, environmental review of a federal action should occur at the earliest possible time to ensure that planning and decisions reflect environmental values. The designation of a NIETC, in particular the Mid-Atlantic National Corridor, is a major federal action that will significantly affect the quality of the human environment. The Mid-Atlantic National Corridor designation allows the federal government to disregard New York's environmental laws and priorities, substituting in place the goal of increasing energy transmission, regardless of the environmental impacts. NEPA's provisions and its implementing regulations require the preparation of an EIS in these circumstances before DOE makes a final agency determination. DOE's anticipation that FERC will conduct a NEPA review in connection

with specific transmission projects in the future misses the mark and does not excuse DOE from satisfying the requirements of NEPA at the present time. A comprehensive review of the environmental impacts of the designation can only take place at the designation stage. .

DOE should rescind its Order designating the Mid-Atlantic National Corridor and proceed with the preparation of an EIS.

Respectfully submitted,



J. Jared Snyder

Assistant Commissioner for
Air Resources, Climate Change and
Energy

Dated: November 2, 2007
Albany, New York

**UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY**

Mid-Atlantic Area) Docket No. 2007-OE-01
National Interest Electric Transmission Corridor)

**PETITION FOR REHEARING
OF THE STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF ALBANY)

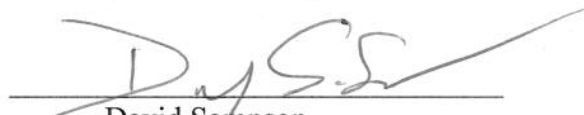
DAVID SAMPSON, being duly sworn, deposes and says:

I am an employee of the New York State Department of Environmental Conservation, the
Petitioner in this action.

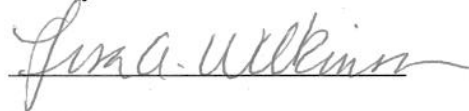
On November 2, 2007, I served Petitioners' Request for a Rehearing upon the Agency listed
below, by placing copies of it in a sealed, post-paid wrapper and processed as Next Day Air mail via
UPS, directed to the United States Department of Energy at the following address:

Office of Electricity Delivery and Energy Reliability, OE-20
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Attn: Docket No. 2007-OE-01 (Mid-Atlantic National Interest Electric Transmission
Corridor.


David Sampson

Sworn to before me this
2nd day of November 2007.



EDMS #282746

LISA A. WILKINSON
Notary Public, State of New York
No. 02WI5036652
Qualified in Albany County
Commission Expires Dec. 5, 2010